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Remarks of Laura Douglas

Secretary of Public Protection and Regulation Cabinet at the 25th Annual Public Defender Conference

"Good afternoon everyone, and thank you, Ernie, for your introduction.

I'm pleased to be with you this afternoon at the 25th Annual Public Defender Education Conference. Congratulations to all of you on this twenty-fifth anniversary of providing criminal legal services to Kentucky's indigent. As many of you are aware, I am a former legal services lawyer. I served as the Associate Director at the Legal Aid Society in Louisville. The network of Legal Services offices throughout the country provides civil legal representation to the nation's indigent citizens.

It seems that all times are challenging times for legal aid and defender organizations. There are, of course, the continual concerns regarding funding, attempts to limit representation through legislative means and service access issues. These are, however, challenges which come, by and large, from the outside.

I would submit, however, that there are challenging issues which are internal in nature and which are primarily impacted by our own energy and outlook. Specially, issues regarding long range planning, organizational structure, training and quality control are equally challenging and deserve attention.

Although time is at a premium, some portion of time, particularly for managers, must be devoted to planning for the days ahead. What legal issues will require more attention? Juvenile justice issues? Drug arrests and prosecution? How should legal aid and defender offices be organized to address these areas of law? What is the best structure for supervision and service delivery? Time spent engaged in long range planning affirms the fact that the work we do is important and its preservation and enhancement deserve deliberate careful thinking. Focusing on quality control and training affirms that those we represent deserve our best efforts and that we are committed to making sure our clients get no less than our best efforts.

It is an understatement to assert that these are challenging times for the legal profession in general. Thanks to several high profile intensely reported cases during the past few years, the

general public believes it now knows a lot more about the practice of law and the justice system. The public is quick to add, however, that it does not like what it knows. I submit that we must work hard to dispel the notion that the practice of law is merely theater. For the clients you represent, the manner in which you practice law is literally the difference between liberty and freedom - life and death. It consists of the unglamorous grittiness of reality. We should resist any portrayal of the justice system as a flawed melodrama which could benefit greatly from radical editing. There is both science and art involved in what you do daily. We can do much to improve the public's opinion of the practice of law and our system of justice if we commit ourselves to being thorough and complete in our actions, civil in our treatment of opposing counsel, respectful to judges and all court personnel, yet tenacious in the advancement of our clients' interests.

Your daily reality consists of representing the left out, locked out and looked over. Prisoner no. 003826. These are the folks that many in society would prefer to ignore. Yet the full worth of our system of justice is measured by how it treats individuals at this lowly rung of the social and political ladder, not by how the privileged and the well-off fare. It not only underscores the importance of the role we play, it also clarifies the importance of our clients.

Again, let me congratulate you on 25 years of criminal defense services to Kentucky's indigent. Here's to at least 25 more years."

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Over 300 Defenders Celebrate 25 Years of Advocacy on Behalf of Kentucky's Poor, and Single Out 4 Advocates for Special Recognition

More than 300 people came to the Annual Kentucky Public Defender Conference to celebrate the Department of Public Advocacy's (DPA) quarter-of-a-century anniversary at the site of the first Annual Public Defender Conference, *The Campbell House Inn* in Lexington, Kentucky, June 16-18, 1997.

The attendees included past Public Advocates; members of the Public Advocacy Commission; Secretary of the Public Protection and Regulation Cabinet, Laura Douglas; current Public Advocate, Ernie Lewis; and public defenders and criminal defense attorneys from across the state. The Conference theme was: *Celebrating 25 Years of Independent Defense of Indigents: Preparing for the Next 25 Years of Interdependent Advocacy With a Focus on Defending Drug Cases*. One defender in attendance spoke the thoughts of many at the Conference when she said that the practical learning offered, the enthusiasm of the Kentucky and national presenters, and the inspiring deeds of the four receiving the awards renewed her commitment to defending Kentucky's poor against the power and resources of the government. "It feels good to be a Kentucky defender."

Four awards were presented by Public Advocate Lewis at the Conference. The *Nelson Mandela Lifetime Achievement Award* established this year by Public Advocate, Ernie Lewis, was presented to **Bob Carran** renowned Covington criminal defense attorney who headed the Kenton County public defender program, which he co-founded in 1971 with 5 other attorneys, for two decades and who has been a Public Advocacy Commission member for over a decade. The Commission oversees the work of DPA. Bob received the 1990 National Legal Aid & Defender Association's prestigious *Reginald Heber Smith* award for his tireless advocacy for indigents accused of crimes from the courtroom to the committee room. Bob has defended with Philip Taliaferro a number of very high profile cases in Covington, including acquittals for Jacqueline Dunn, Gerald Kaufman, and Mr. O'Donnell, all charged with murder. For over two decades Bob has labored at much personal and professional sacrifice to his private practice to advance the right to counsel in the Commonwealth in many uncommon ways. Bob's life honors the profession of defending criminal defendants. In seconding Bob's nomination, former Chair of the Public Advocacy Commission William R. Jones, now Professor of Law Emeritus of Chase College of Law said, "As the head of the Kenton public defender program, he fought the battles of inadequate funding, helped attorneys inexperienced in criminal defense work gain the experience necessary to give an honest defense to the defender program's clients, and defended many himself." Lewis said, "I am establishing the *Mandela Lifetime Achievement* award to honor people who have labored over a lifetime to advance the cause of freedom and

justice. I am thrilled to be able to inaugurate this award by naming someone of the caliber of Bob Carran."

The *Rosa Parks* award was given to **Bill Curtis**, a research analyst, who has worked with DPA since 1980. He has done many venue surveys in capital cases across Kentucky, has been instrumental in obtaining substantial grants for capital post-conviction assistance and indigent defense work in Kentucky, and is the Department's expert in caseload data collection and analysis. His change of venue work has contributed to securing sentences less than death. From the inside, Bill has been a long time resource for Kentucky's statewide defender efforts. "Bill's work as a criminal justice analyst has been invaluable," Ernie Lewis said, "he helps us immensely to gain necessary funding. He has added his passion in the individual cases by working with attorneys to obtain changes of venue in our most serious cases."

The *Gideon* award was presented to **Allison Connelly**, clinical professor of law at the University of Kentucky, for her 12 years of work as a Kentucky public defender as a staff attorney in the Post-Conviction Office at the Northpoint prison, head of DPA's Post-Conviction Branch, and as Kentucky's first woman Public Advocate from 1993-1997. She created new full-time offices in Kenton County, Elizabethtown, and Madisonville, along with increased staff for the Capital Trial Unit and increased staff for Jefferson and Fayette Counties. She established the *Gideon* Award in 1993, the 30th Anniversary of *Gideon*. In giving this award, Lewis observed, "It is an honor to give an award to my predecessor. Allison has devoted her life to advancing the right to counsel. She is one of *Gideon's* true guardians."

The *Public Advocate* award was bestowed on **David Richart** of Louisville, who has been the Executive Director of the Kentucky Youth Advocates which he helped found in 1975 for 20 years. He has been the leading advocate on behalf of children in this Commonwealth on the most significant children's policy issues of the day. He co-authored *Fairness Is a Kid's Game*, the seminal work on child advocacy. The National Association of Child Advocates identified him as "the premier long distance runner of child advocacy; our historian, our theoretician, and for many of us, our consultant and mentor." In August 1997 Richart will continue his legacy of professional service to children and youth as associate professor in the Spalding University Graduate School of Social Work, as director of the National Institute on children, Youth and

Families, Inc., and as a consultant to child advocacy organizations throughout the country. Lewis commented on the importance of Richart's endowment to the Commonwealth, "Cynics would say one person can do little. Dave Richart would quiet the cynic. He has advocated for the children, particularly poor children, for over 20 years. He is effective, he is insightful, and he is a true national children's rights leader."

In a letter to Ernie Lewis after receiving the award, Mr. Richart said: "As I reflect back on my 'first' career in Kentucky-based child advocacy, and as I turn toward developing a national child advocacy training center, I remember with much admiration the work of the state's public

defenders. In many cases, Kentucky Youth Advocates (KYA) has stood on the shoulders of the state's public defenders, as your attorneys identified many of the problems on which KYA later worked. It is Kentucky's public defenders who are the real heroes and heroines for their eager representation of the 'mad-sad-bad can't add' children who are too often marginalized and scapegoated. Their representation of these young people has inspired all of us at KYA throughout the years and set a standard by which we measure our own advocacy."

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Power, Change & Miracles

The following are the remarks from Nancy Hollander, who spoke at DPA's 25th Annual Public Defender Conference.

"I too want to talk about power and I want to talk about change and I want to talk about miracles. We all have this license to practice law and it is truly a gift -- a gift of great power, the power to change people's lives; the power to change the law; the power to create miracles. It is a power we must use carefully, but not sparingly. There is no end to it.

This power is not like the thin legs of a race horse, legs that will carry the horse only through so many races. Nor is it like the power of great baseball pitcher whose arm will inevitably fail him. This is a gift of unlimited power. It is limited only by the horizons of our vision.

Without lawyers who believed in miracles, used their power and had the courage to demand change, Mr. Gideon would not have had a lawyer and would never have had the second chance he needed to hear those sweet words, we all wait to hear: "Not Guilty." Gideon, who wrote to the United States Supreme Court on a yellow pad from his prison cell, would have spent the rest of his life in that cell, were it not for lawyers' vision and courage.

Where would Mr. Gideon and his lawyers be if they had said, "The precedent is all against us?" Where would Mr. Gideon be if the lawyers who finally represented him did not have the courage to refuse to embrace the prevailing legal concept of the day that said that a poor person is not entitled to a lawyer? Where would we be today?

We must never, ever, ever feel bound by precedent. If lawyers do not argue against precedent, the law will never change, cases will never be overruled. We will see no progress. We will not make the miracles our clients need.

Sometimes it takes guts, swimming up stream against years and years of arguments and opinions, telling one judge after another that your cause is just, your argument sound, -- their precedent wrong.

This precedent that we hear so much about, it is nothing compared to our power. Precedent is

nothing more than a jumping off point to project our clients and the courts into the unknown and the untried. We must always argue for change and we must always argue with passion and with courage. Above all else, we must always believe in our clients.

Remember, no matter what we do or what we say, if we stay within the bounds of ethical

conduct - as we always must - they don't take lawyers out in the back of the courthouse and shoot them. We may make fools of ourselves but our clients deserve no less. We must always be fearless in the quest for the miracles our clients need to win.

And we must never forget, as I am sure no one here will, that while most of the civilized world declares the death penalty to be an outmoded form of punishment, in the United States of America we suffer our children, our mentally ill, our poor to the ultimate torture - to death at the hand of our own government.

We have chosen a calling where we almost always lose. We lose our trials, we lose our motions, we lose our appeals. And isn't that really how it should be? In a perfect world we would not even be needed. The police would arrest only guilty people; sentencing would be humane, the police would properly and ethically collect evidence.

But that is not how it is. We have much work to do. But for all our mistakes and misdeeds in this country, it is through the courage and vision of lawyers that we have made some progress. For if posterity judges a free society by how it treats its individual members, it should be of some considerably consolation to us all that our system of justice no longer requires an individual accused to stand alone. Thank you."

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Fairness of Death Penalty Required

The Department of Public Advocacy (DPA) is saddened by the execution of Harold McQueen. We were charged with the responsibility to represent him from his arrest in 1980 until his death by electrocution on July 1, 1997. Our constitutional duty was to provide him with the effective assistance of counsel at trial, appeal, and during post-conviction. Our duty was also to ensure that the verdict that allowed his death was a fair and reliable verdict. We have met our duties with mixed results.

This death has done nothing to lessen DPA's resolve to call for a moratorium on executions in Kentucky until it is administered fairly. Indeed, Harold McQueen's death demonstrates that the death penalty in Kentucky is administered in a deeply flawed manner, as it is throughout the country, according to the American Bar Association's House of Delegate's February 1997 Call for a Moratorium.

The people of Kentucky have determined that we are to have a death penalty. If we are, then significant change must occur. DPA calls upon the different parts of the criminal justice system to ensure the fairness of the death penalty by:

1. Eliminating the death penalty for juveniles;

2. Eliminating racism from the death penalty by passing the Racial Justice Act;

3. Making the law prohibiting the death penalty for the mentally retarded retroactive so that mentally retarded persons presently on death row will not be executed;

4. Ensuring a reliable post-conviction process that guarantees that significant constitutional issues have a fair hearing in state and federal court;

5. Ensuring that indigent defense receives reasonable funding for capital defense so that no one receives the death penalty due to their poverty.

This is a somber moment for all of Kentucky. It is time to be respectful of the mourning of family members of both the victim and the executed.

ERNIE LEWIS
Public Advocate

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A Plea for A Moratorium on Executions in Kentucky As Called for by the ABA

Reliability & Fairness are Lacking. Kentucky law provides for capital punishment. As executions are considered, we must assure absolute fairness and we must insure utmost reliability. When the 30 death row cases in Kentucky are analyzed, they strongly indicate unfairness and unreliability in imposing this ultimate and irreversible penalty. In light of the substantial deficiencies in the adjudication of these cases resulting in death sentences, the American Bar Association's (ABA) formal request to halt executions should be heeded in Kentucky.

1997 ABA Resolution Calls for Moratorium. The ABA House of Delegates in a February 3, 1997 Resolution (No. 107), passed by a 280-119 vote, called for a moratorium on executions in this country until jurisdictions implement policies to insure that death penalty cases are administered fairly, impartially and in accordance with due process to minimize the risk that innocent persons may be executed.

Far from being administered fairly and reliably, the death penalty in this country, according to the ABA, is "instead a haphazard maze of unfair practices with no internal consistency." Kentucky mirrors that national reality.

The ABA resolution establishes a legal position on fairness in the application of the law; it is not a policy statement for or against the penalty. Former ABA President John J. Curtin, Jr. told a congressional committee in 1991, "Whatever you think about the death penalty, a system that will take life must first give justice." *Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, U.S. House of Representatives, 102d Cong., 1st Sess. at 447 (1991). The ABA resolution was supported by 20 of the 24 former American Bar Association presidents who are living.

State Bar Responses Begin. The Illinois, Connecticut, Pennsylvania, and Missouri Bar Associations are working on death penalty issues in light of the ABA resolution for a moratorium. For instance, the Criminal Law Committee of the Missouri Bar has voted by at least a 2-1 margin to call on the Governor of Missouri to impose a moratorium on executions in Missouri on the basis of the ABA House of Delegates recommendation of February 3, 1997.

Kentucky Bar Association. Because of its unique leadership role, the Kentucky Bar Association was asked on June 17, 1997 at a Board of Governors Meeting in Louisville by Public Advocate Ernie Lewis, Kentucky Association of Criminal Defense Lawyers President Jerry Cox, and Everett Hoffman, Chair of the Kentucky Coalition Against Executions to join these state bars' and the American Bar Association's efforts.

The KBA declined to adopt the proposed resolution of KACDL and DPA. On motion of Kent Westberry and a second of John Stevenson, the Board unanimously referred the matter to the Legislative Committee, which is chaired by John Stevenson of Owensboro, for review and recommendations to the Board.

Discriminatory Application. As forewarned by the late Justice Thurgood Marshall, "When we tolerate the possibility of error in capital proceedings...we hasten our return to the discriminatory, wanton and freakish administration of the death penalty that we found intolerable in *Furman*."

5 Dimensions of Unfairness. The ABA's call for a suspension of executions focuses on five significant areas:

1) incompetency of counsel;
2) racial bias;
3) mentally retarded persons;
4) persons under 18 years of age; and,
5) preserving state & federal post-conviction review.

"Kentucky has now gone through the door into the world of executions, a world we have not had for 35 years," Public Advocate Ernie Lewis said. "We should only continue to enter that world if we are certain that the system we have in place ensures fairness and reliability. The ABA Moratorium Resolution calls into question the reliability and fairness of the death penalty in all jursidictions. The Kentucky reality does nothing but buttress the ABA's concerns."

The following review of Kentucky death row cases demonstrates the need for a moratorium on executions in this Commonwealth. Accordingly, Kentucky's Attorney General should immediately halt his request for executions.

Incompetency of Counsel in Kentucky Capital Cases

The inadequacy of counsel is a stark, long-standing problem in Kentucky death row cases. Poor lawyering is one significant reason for persons being sentenced to death. A

disturbing number of death row inmates were represented by attorneys who were previously or subsequently disciplined by the KBA and/or Kentucky Supreme Court.

Epperson, White, Sanders. Three of the thirty men on Kentucky death row (Roger Epperson, Karu Gene White, David Sanders) were represented by attorneys (Lester Burns, Kevin Charters) who have been disbarred or had their license suspended. A significant number of other death row inmates were represented by attorneys who were otherwise disciplined or sanctioned by the bar.

Harold McQueen was sentenced to death for the 1980 murder of Rebecca O'Hearn during his robbery of a Richmond convenience store where she worked as a clerk. McQueen's attorney was court-appointed by the Madison Circuit Court Judge, who was openly pro-death. The appointed attorney represented McQueen by himself, against all national standards of practice that require two counsel. The attorney did not investigate his client's past, failed to put on a witness to testify to Harold's troubled life, and had a psychiatrist testify who was ill-prepared and who failed to discover Harold was brain damaged. Dissents in both the Kentucky Supreme Court and Sixth Circuit Court of Appeals observed that, but for the errors of counsel, the jurors may have imposed a non-death sentence. McQueen's co-defendant, arguably the more culpable, was represented by an experienced retained counsel and received a 20 year sentence. McQueen was executed July 1, 1997.

Gregory Wilson's "representation" was, by any objective standard, truly a farce and mockery of justice. Initially, after a relatively lengthy, frustrating and largely unsuccessful effort to secure the services of an attorney for Mr. Wilson, contract counsel was finally retained. One of those attorneys subsequently withdrew as counsel due to a conflict of interest and the other ultimately withdrew due to health problems. During that period of time, DPA provided lawyer assistance through the Capital Trial Unit, but that lawyer eventually withdrew from the case as well, leaving Mr. Wilson without any representation with trial scheduled to commence in a matter of weeks. The trial judge then posted a notice on his courtroom door "desperately" seeking volunteer counsel to provide representation on the scheduled trial date. Only two attorneys responded - one had never handled a felony case before, and the other had a serious drinking problem which was well-known amongst members of the local bench and bar. He had also been the subject of bar disciplinary action. That attorney, who supposedly acted as lead counsel, had never before handled a case in which the death penalty was sought, had no established law office or library to speak of, and engaged in minimal, if any, pretrial investigation or preparation. Furthermore, said "lead" counsel was not present when the jury was selected, and was frequently absent during trial proceedings. No defense witnesses were called during trial and no mitigation evidence was presented on behalf of the defendant during the penalty phase, despite the fact that, among other things, the co-defendant had given a statement admitting that she had inflicted the fatal injury upon the victim. The injustice of this case has received national attention, including a recent feature by National Public Radio on the anniversary of the Supreme Court's decision in *Gideon v. Wainwright*.

Kevin Stanford had no defense presented to the jurors during the guilt phase by his attorney, in contrast to the co-defendant's attorney who presented a substantial defense and who was sentenced to life imprisonment. This attorney failed to present well-investigated mitigation evidence in the penalty phase. No evidence was presented on the history of his being repeatedly sexually abused. No social history was presented.

James Slawter had no defense presented for him in the penalty phase. At the post-conviction stage, the defense attorney said that more than 99% of his preparation for trial was devoted to the guilt/innocence phase and as a result he said he "did not fully investigate available documents and witnesses that were relevant to the penalty phase of the trial." The attorney did no preparation of the defendant for his critical testimony at the penalty phase.

Brian Moore's trial counsel completely missed the evidence which would have shown the prosecution's star witness to be a perjurer. Further investigation has also revealed that this witness was a family friend of the victim. Since the jury didn't have any of this information, Mr. Moore was sentenced to die for a crime that the actual perpetrator has repeatedly confessed to. Ten people, who heard those confessions from the actual murderer, have given their sworn testimony about it. The trial lawyers have acknowledged that they rendered ineffective assistance.

Hugh Marlowe's attorney had been practicing criminal law for only a few months and had handled only one felony trial before Marlowe's trial. He did practically no investigation or preparation for the penalty phase and presented no evidence and only a very brief argument at that phase.

Gene White was represented at his trial by two retained defense lawyers who agreed to represent jointly Gene and his two co-defendants in their capital trials for the murders of three elderly individuals. During Mr. White's trial one of his co-defendants agreed to testify for the prosecution against Mr. White in return for immunity. As a result during jury selection Mr. White's lawyers withdrew from representing that co-defendant, but remained as Mr. White's lawyer throughout his capital trial, including the cross-examination of their former client. Mr. White's co-defendants received no conviction as a result of the immunity agreement and the other co-defendant, who went to trial later with new counsel, received a conviction and sentence of twenty years.

Discrimination Exists in Kentucky Capital Sentencing on the Basis of the Race of Either the Victim or Defendant

There are 7 African-Americans on Kentucky's death row of 29 men. This represents 24% of the death row population, compared with Kentucky's non-white population of 7.7%. All the victims of these 7 death row inmates were white.

Kevin Stanford, a 17 year old black juvenile, was bombarded with racist slurs and epithets by a group of officers when arrested. He was convicted of the murder and sodomy of a white woman and sentenced to death by an all white jury in Louisville, a city saturated with prejudicial publicity about the crime. Kentuckians want the assurance that race is not a part of the capital process as indicated in a 1989 statewide poll conducted by the University of Louisville's urban Research Institute which shows 92% of Kentuckians believe that capital laws should guarantee no racial bias in the application of the death penalty.

Gregory Wilson, a black man, was represented by inexperienced, unprepared volunteer attorneys who failed to challenge the prosecution's exercise of peremptory challenges against African-American jurors pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). Mr. Wilson was charged, along with a white co-defendant, with the murder, rape, robbery and kidnapping of a white woman. There were questions asked during voir dire about the jurors' feelings concerning a sexual relationship between a black man and a white woman. The co-defendant's attorney also observed that a white girl dating a black man was not considered to be "normal" in Kenton County. There were few black jurors on the jury panel. Mr. Wilson, a black man, was sentenced to death. His white co-defendant was sentenced to life without parole for 25 years.

Beoria Simmons, a black man, was tried and convicted of rape and murder of three white women. Even though there were obvious racial overtones to the case, defense counsel failed to ask prospective jurors about the racial aspects of the case or about their feelings on inter-racial sexual relationships. The prosecutor used peremptory strikes on five of the seven blacks on the jury venire and defense counsel failed to make a timely *Batson* claim.

Victor Taylor grew up in Louisville's inner city. A black man, he was convicted of killing two white men who had gotten lost in Louisville's Smoketown, the oldest African-American neighborhood in Louisville, on the way to a high school football game. The prosecutor used half of his peremptory challenges to strike two-thirds of the black jurors from the jury panel. When asked to explain his strikes the prosecutor said he had "no other rational reason" for striking nearly all of the black jurors.

James Slawter, a young black man, was convicted of stabbing a middle-aged white female. Witnesses testified that a white man was seen running from the scene with a bloody knife. Trial defense counsel asked no questions of the prospective jurors about the racial aspects of the case despite the fact that the United States Supreme Court has recognized that the need for a searching inquiry about race on voir dire is particularly great because of the "unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28 (1996).

Ernest Rogers, a twenty-one year old black male, was tried in Christian County with a co-defendant of mixed race who appeared white or hispanic. Rogers was convicted, *inter alia*, for attempting to rape and killing a young white woman in 1994. All of the direct evidence was against the co-defendant; yet, the jury hung on his guilt. A challenge was sought to the

prosecutor's use of 7 of its 9 peremptory challenges on blacks, and one on a woman who looked hispanic. Since the jury had been sworn in the last thing on the Friday, and since the *Batson* challenge was not raised until the first thing on Monday morning, no hearing was held on the racial motivation of the strikes. Two blacks remained on the jury. The jury so selected hung on the penalty phase. A new penalty jury was later empaneled. The two blacks who reached the final cut were eliminated by the prosecutor whose grounds were found race neutral. The resultant all-white jury gave Rogers the death penalty. Three years since the offenses, the co-defendant has yet to be retried.

A study commissioned by the 1992 Kentucky General Assembly of all homicides between 1976 and 1991, Keil & Vito, *Race and the Death Penalty in Kentucky Murder Trials, 1976-1991: A Study of Racial Bias as a Factor in Capital Sentencing* (Sept. 1993), demonstrates race is a factor in Kentucky capital sentencing. Defendants were more likely to be sentenced to death if their victims were white, most especially if the defendant was black.

Mentally Retarded and Mentally Ill Defendants

Since July 1990, Kentucky has had a procedure for identifying those persons who are seriously mentally retarded and eliminating death as a possible punishment for those individuals, KRS 532.135 and 532.140. Nevertheless, Kentucky still has mentally retarded defendants sentenced before 1990 on death row, and severely mentally ill defendants continue to be sentenced to death.

Eugene Gall, Jr. is a 51 year old Hillsboro, Ohio man who was brain damaged as a youth, resulting in his experiencing grand mal seizures before his 20th birthday. He was also sexually abused as a child. At age 22, he was declared incompetent to stand trial on Ohio charges. He spent 2 years in an Ohio mental hospital before being found competent. He was convicted of the murder of a 12 year old girl, and diagnosed by a psychologist and a psychiatrist as suffering from paranoid schizophrenia, both of whom testified that Mr. Gall was insane when he killed Lisa Jansen. A Commonwealth's psychiatrist, who examined Mr. Gall briefly shortly after the crime, agreed in 1989, 11 years after the trial, that Mr. Gall was mentally ill. In 1991, a neurologist and a neuropsychologist examined Mr. Gall and found that he was brain damaged at the time he killed Lisa Jansen. Rather than meet the substantial evidence of severe, longstanding mental illness presented by the defense at trial, the prosecutor ridiculed the insanity defense and kept critical mental illness records from the Commonwealth's psychiatrist.

Kevin Stanford tested in the 5th grade and again in 1978 with an IQ of 70 on the WISC-R. Since being sentenced to death, he has been diagnosed by psychologists as suffering from chronic post-traumatic stress disorder from the repeated sexual assaults and the emotional neglect that pervaded his childhood.

David Skaggs was born in a mental hospital to a schizophrenic mother. Skaggs had a psychological examination before his trial, but it was later learned that the "psychologist" who performed this examination had lied about his credentials. Not only was he not a licensed psychologist, but he had not even graduated from college and received D's and C's in his only college level psychology courses. This "expert's" trial testimony was interspersed with references to canes that are perceived to be elephants, chocolate ice cream, Frenchmen who get furious if called a camel, Einstein's use of Fels-Naptha soap and James Watt, and was soundly ridiculed by the prosecutor. As a result of this fraud, the jury never heard about David Skaggs' numerous, and very real, mental problems. After his trial and appeal Skaggs was examined by competent mental health professionals and it was discovered that he is mentally retarded. Additional psychological testing has indicated the presence of organic brain damage and a major psychosis, schizotypal personality disorder.

Victor Taylor was diagnosed with organic brain dysfunction that has probably been present since birth. This organic problem is further complicated by low intelligence. In school, Taylor was tested three times with results in the mentally retarded range. At age 25 he was diagnosed as borderline mentally retarded and had a mental age of 12-1/2 years old.

Ralph Baze had a history of being diagnosed as paranoid schizophrenic. This diagnosis carries with it the characteristic of being suspicious when there is not sufficient data to warrant those feelings. The circumstances of Baze's offenses were that a deputy sheriff came to his home without a warrant and informed Baze he was being picked up for some charges listed on a piece of paper which included offenses which Baze knew were invalid. Baze did not trust that there was a warrant on charges and asked the sheriff to produce a valid warrant, at which time he would go willingly. Rather than comply, the deputy got back up of the sheriff and several other officers. There was conflicting testimony about who fired first, with several witnesses and Baze swearing the police fired first, and other witnesses saying the contrary.

Persons Under the Age of 18 at the Time of Their Offense

Kentucky allows a person to be executed if 16 years of age or older under KRS 640.040. Currently, only half of the states with death penalty statutes and 5 other countries have laws that allow juveniles to be executed. Since the reinstatement of the death penalty in 1976, 9 people have been executed for crimes committed as 17 year olds. Of the 143 juvenile death sentences imposed since 1973, 91% have resulted in reversals.

Kevin Stanford was 17 at the time he was convicted of murder, robbery, sodomy and theft. His co-defendants, Troy Johnson and David Buchanan, were 17 and 16 years old respectively. Johnson received 9 months in juvenile detention. Buchanan received a life sentence plus two twenty year sentences for rape and robbery. Kevin had no defense to the crime presented for him despite the availability of a substantial defense. The co-defendant's attorney presented

evidence on his client's prior juvenile treatment and mental health problems.

Insufficient Funding of Kentucky's Defense of Indigents Accused of A Capital Offense

For the last two and half decades, Kentucky has ranked near or at the bottom nationally in the amount of money it has paid to defense attorneys representing indigent capital clients. Until 1986, the maximum compensation for attorney fees was $1,250 per attorney. The maximum was $2,500 until 1995 when it was raised to $5,000. Through all these years the hourly rates were at $25/hour for out-of-court and $35/hour for in-court work. It was just raised in May 1997 to a maximum of $12,500 with the hourly rate increased to $50 in and out-of-court. The remains of the scandalously low compensation are scattered throughout Kentucky's death row. The justice system gets what it pays for.

Harold McQueen's attorney was court-appointed by an openly pro-death Judge. He was compensated a woefully inadequate $1,000 for his work, far less than his office overhead, and far less than the minimum wage. The defense of McQueen was inadequate. McQueen was executed July 1, 1997.

Eugene W. Gall, Jr.'s two attorneys, who were in private practice and had a public defender contract, represented all the indigent criminal defendants in Boone County in 1978 for $14,400, no matter what the number, including the capital defense of Gall. The trial alone lasted two weeks, and it took place a mere 5-1/2 months after in district, the second quickest capital trial in Kentucky since 1976.

Gregory Wilson. After several attorneys withdrew as counsel of record, Mr. Wilson was ultimately "represented" by unqualified lawyers who volunteered *pro bono* to undertake his difficult and complex defense shortly before a scheduled trial date. These attorneys volunteered at the trial judge's request (1) after efforts to secure the services of an attorney from the local defender roster failed due to the nature of the case and the inadequacy of the existing statutory rate of compensation, and (2) the DPA asserted that it did not have sufficient staff or resources to provide counsel.

John Mills was represented by only one attorney who was paid but $5,000 at the rate of $25 per hour for out-of-court work and $35 per hour for in-court work.

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The Advocate, Vol. 19, No. 4 (July 1997)

Governor Comments on Signing Warrant and on McQueen Execution

Frankfort, Ky., Wednesday, June 11th: "I have today signed a warrant ordering the Warden of the Kentucky State Penitentiary to carry out the execution of Harold McQueen on July 1, 1997.

Mr. McQueen was convicted by a twelve person jury and sentenced to death in Madison County in 1981 for the commission of a brutal murder during the course of a robbery. Since that time, his case has gone through exhaustive appellate review afforded under our state and federal judicial systems and further review of his case was recently denied by the United States Supreme Court for the fourth time.

Citizens of Kentucky with strong feelings, both pro and con, about the moral and religious issues associated with the death penalty have written to me and have met with me to make their feelings known. I have heard and considered what they all have to say. As your Governor, I must carry out the will of the people, as reflected in the laws of this Commonwealth.

Therefore, it is my policy not to grant clemency in cases where the death penalty has been recommended by the jury and imposed by a

circuit court of our state. I will not, through the power of clemency, substitute my judgment for that of the General Assembly, the courts, and the juries of the Commonwealth."

Frankfort, Ky., July 1, 1997: On July 1, 1997 Governor Patton released the following statement following the execution of Harold McQueen in Kentucky's electric chair. "It is my hope that the execution will stand as a grim reminder for all of us, especially for the children of Kentucky, of the consequences of drugs. The case of Harold McQueen shows us that a life of drugs leads to a life of crime with death as the ultimate end. It not only led to Mr. McQueen's death but to that of his victim, Rebecca O'Hearn. Any of our children could end up on either side of these tragedies. When drugs are involved, we are all potential victims.

As far as the means of execution, I believe there is a room for legislative debate over the use of electrocution versus lethal injection."

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The Advocate, Vol. 19, No. 4 (July 1997)

The Power, Practice and Process of Commutation of Persons Sentenced to Death

1. Executive Power

"Clemency is a broad power resting in the executive branch of the government. It includes pardons (which invalidate both the guilt and the punishment of the defendant), reprieves (which temporarily postpone the execution), and commutations (which reduce the severity of punishment). 'Clemency decisions - even in death penalty cases - are standardless in procedure, discretionary in exercise, and unreviewable in result....' In most states that have a death penalty, this power rests solely in the hands of the governor who acts alone. Other states use boards of pardons, which may or may not need gubernatorial concurrence to act." Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 Univ. Richmond L.Rev. 289, 289-90 (1993).

Clemency has been with us as long as the death penalty itself. It existed in ancient Greece, where the Ecclesia (assembly), as the supreme organ of power in the greek democracy, controlled the dispensation of pardons. Thus, the Ecclesia was empowered to annul the verdicts of the Dicasteries (courts).

The practices and procedures employed by the Ecclesia appear remarkably similar to modern American approaches to clemency. "The prisoner was permitted to appear before the assembly and pled for mercy; friends were permitted to testify on his behalf. Among the reasons for granting pardons were the disclosure of new evidence relevant to guilt, violations of 'due process' as understood at that time, and the widespread popularity of the accused." Note, Executive Clemency in Capital Cases, 39 *NYUL Rev.* 136, 139 (1964), citing Bonner and Smith, *The Administration of Justice from Homer to Aristotle*, 253-56 (1938).

2. Constitutional Basis

In Kentucky, Section 77 of the 1891 State Constitution gives the Governor power to commute death sentences:

> §77. Power of governor to remit fines and forfeitures, grant reprieves and pardons - No power to remit fees. - He shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons, except in case of impeachment, and he shall file with each application therefor a statement of the reasons for his decision thereon, which application and statement shall always be open to public inspection. In cases of treason, he shall have power to grant reprieves until the end of the next session of the General Assembly, in which the power of pardoning shall be vested; but he shall have no power to remit the fees of the Clerk, Sheriff or Commonwealth's Attorney in penal or criminal cases.

3. Permissive Statutory Process

A Kentucky Governor can act alone, or the Governor can involve the Kentucky Parole Board, which acts as a clemency board. Under KRS 439.450, the Governor of Kentucky can choose to use the existing Parole Board to investigate and report to him on requests for commutation of sentence:

> **439.450 - Board to make investigation and report to Governor** - On request of the Governor the board shall investigate and report to him with respect to any case of pardon, commutation of sentence, reprieve or remission of fine or forfeiture.

The Governor does not have to use this process, and most of the past commutations of death sentences by Kentucky Governors have apparently not used it.

4. Purpose of the Power of Clemency

The power of clemency is an ancient power, which existed before establishment of this country. In England, the King used the power to ameliorate injustice, or to grant mercy. Clemency "operate[s] as a principled means of correcting some of the flaws extant in our penal system." Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex.L.Rev. 569 (1991).

"Although the reasons for granting capital clemency have varied historically, the executive power to spare prisoners from the death penalty is deeply rooted in Anglo-American criminal law. As one link in the chain of decisions by which the state selects offenders for capital punishment, clemency is functionally integrated with the earlier, judicial stages of the process. Yet the clemency decision also involves the consideration of factors that are not cognizable in the judicial process. Proper exercise of the clemency power requires that the decisionmaker have full and accurate information about the offender, the offense, and the needs of society, in order to determine whether to spare the condemned prisoner." *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 Yale L.J. 889, 891-92 (1991).

"Three separate rationales underlying the use of executive clemency can be identified. The first is unrestrained mercy. Clemency is a free gift of the executive, needing no justification or pretense of fairness. The second is a quasijudicial rationale suggesting that governors and clemency officials may consider factors that were not presented or considered by trial judges, juries, or appellate courts. The third rationale is a retributive notion of clemency, which is intended to ensure that only the most deserving among the convicted murderers are executed. This third rationale is the narrowest of the appropriate uses of clemency. Historically, the use of executive clemency has encompassed the broader views of its proper rationales." Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 Univ. Richmond L.Rev. 289, 290 (1993).

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. *Herrea v. Collins*, 113 S.Ct. 853, 866 (1993).

5. Diffused Responsibility in the Death Process

No one person or entity is responsible for deciding whether a person should be killed by the state of Kentucky. The ultimate decisionmaking responsibility is substantially diffused throughout the criminal justice system and the Executive Branch among Commonwealth Attorneys, Assistant Attorney Generals, the Attorney General, jurors, trial judge, appellate judges, victim's family, and the public.

Consideration of clemency by the Chief Executive, however, rests with a single individual and is shared with no one. A Governor is the only person in the death process who has the opportunity, responsibility, and power to consider all the information, every factor, and *all* the competing values. No other person has this opportunity, responsibility and power.

"The modern system of capital punishment diffuses and fragments the power to decide who dies. Because the system is composed of multiple actors, no single actor bears the burden of undivided power and responsibility. This division of moral labor tempts actors at the front of the system, such as prosecutors and juries, to convince themselves that later actors will correct any error in judgment they might happen to make. Yet later actors, such as state and federal appellate courts, are in turn disinclined to upset decisions already made and legitimized by a sequence of earlier actors. Where power is divided, responsibility shuffles to and fro in a fatal kind of perpetual motion, never really settling anywhere. In the end, 'nobody actually seems to do the killing.' So long as the system's

basic architecture remains unaltered, the power to decide who dies will inescapably be dispersed." Stephen P. Garvey, *Politicizing Who Dies*, 101 Yale L.J. 187 (1991).

6. Myth of Thorough Review

There is a myth that condemned inmates' cases are closely and completely scrutinized not only by state courts but by the federal courts as well through the 9 steps of the post-conviction process. Post-conviction judicial review of capital convictions is much more elaborate today than it was fifty years ago. Virtually every inmate with a realistic execution date has petitioned a federal court for relief at least once. The public perception is that the legal system gives death row prisoners far too many opportunities to complain about unfair trial proceedings.

The reality is much different than the myth. Harsh federal nonretroactivity doctrines, rigid federal procedural default rules, and crippling burdens of proof all conspire to insulate capital cases from full and fair appellate and post-conviction judicial review. Psychologically, judges who review the case subsequent to the trial put inordinate faith in the fairness and reliability of the trial.

While it may be counter-intuitive, it is common for a defendant who has had both state and federal judicial review to have substantial issues which have not been considered on the merits due to some technical mistake by the defendant's attorney. For example, the failure of the attorney to say "I object" at trial is increasingly a justification of appellate courts to completely refuse to look at whether or not there was an error.

The law rightly evolves. However, nonretroactivity rulings prevent those sentenced to die to receive the benefit of our more developed understanding of what is needed for fair process and reliable results.

More and more, newly discovered evidence which has significant influence on the issues in a case is not considered by courts because courts say it should have been presented earlier.

7. Clemency Nationally

Clemency grants in this country post-*Furman v. Georgia*, 408 U.S. 238 (1972) have occurred with some frequency. Nationally since 1976 there have been 75 commutations of capital defendants sentenced to death. Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 Univ. Richmond L.Rev. 289 (1993) (70 are listed in this article. Five have occurred since this article.

8. Kentucky Clemency to Life Without Parole

Clemency has occurred with some frequency in Kentucky capital cases. Since 1920, eight Kentucky Governors have commuted 35 sentences of death to sentences of life imprisonment.

The last commutations of death to life occurred in 1967 when Governor Ned Breathitt commuted the death sentences of 3 men.

In some Kentucky cases where the death penalty had been imposed for murder past Governors have commuted those sentences to life "without privilege of parole." Although such a penalty was not authorized by statute, those commutations have survived attack in both the Kentucky and the federal courts. *Hamilton v. Commonwealth*, 458 S.W.2d 166 (Ky. 1970) and *Hamilton v. Ford*, 362 F.Supp. 739 (E.D.Ky. 1973).

The commutations signed by Governor Breathitt provide insight into reasons Kentucky governors have granted clemency: the comparison to other prisoners guilty of similar crimes who are serving life sentences, and the opinion that life is a greater deterrence than death.

Many of the Kentucky clemency grants (for defendants Hamilton, Martin, Smith, Jeffries, Bowling, Gray, Lewis, Pearson, Cambrell, Orndorf, McCasland, McPerkins, Williams, Grigsby/Keller, Beckam, Abbott, Johnson, Thomas, Ratliffe) were because of particular facts of the case.

Mitigating factors in a case are reasons Kentucky governors have granted clemency: drinking (defendants: Hamilton, Orndorf, Abbott, Sayre, Hughes, Thomas); family background (defendants: Mercer, Gambrel); lack of prior record (defendants: Hamilton, Mercer, Jeffries); mental problems (defendants: Wasson, Douthitt, Garman, Babey).

9. Factors Considered in Grants of Clemency

In their 1993 article, Radelet and Zsembik identify the following historical categories of clemency grants:

A. Judicial expediency;
B. Humanitarian reasons; justice-enhancing reasons:

1. unqualified mercy;
2. lingering doubt of guilt;
3. defendant's mental problems;
4. proportionality, equity;
5. rehabilitation;
6. remorse.

Hugo A. Bedau in *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 255 (1990-91) sets out nine reasons why capital clemency has been granted over the years:

- "The offender's innocence has been established."
- "The offender's guilt is in doubt."
- "Equity in punishment among equally guilty co-defendants."
- "The public has shown conclusively albeit indirectly that it does not want any death sentences carried out."
- "A nonunanimous vote by the appellate court upholding a death sentence conviction leaves disturbing doubt about the lawfulness of the death sentence.
- "The statutes under which the defendant was sentenced to death are unconstitutional."
- "Mitigating circumstances affecting the death row prisoner's status warrant commutation to a lesser sentence."
- "Rehabilitation of the offender while on death row."
- "The death penalty is morally unjustified."

Other factors which Chief Executives take note of in making clemency decisions include:

- A reason that only affects this one case.
- Nature of the crime.
- Provocation, premeditation, duress, diminished capacity.
- Prosecutor discretion, misconduct.
- Juror discretion, misconduct.
- Judicial discretion, misconduct.

- Issues not reached on the merits by the courts due to nonretroactivity, procedural default.
- Prior offenses.
- Housed safely, not dangerous in future in prison.
- Principled motives.
- Newly discovered evidence, *e.g.*, brain injury.
- Lack of sufficient resources for counsel at trial.
- Excessive prejudicial publicity.
- The trial was fundamentally unfair.
- There exists geographic unfairness.
- Ineffective assistance.

10. Legal Developments in the Courts

Several cases indicate unresolved issues and evolving constitutional trends.

In *Lackey v. Texas*, 115 S.Ct. 1421 (March 27, 1995) while the United States Supreme Court denied certiorari on the issue of whether executing a prisoner who has already spent some 17 years on death row violates the 8th Amendment's prohibition against cruel and unusual punishment two Justices called for a decision on an unresolved issue. In an opinion in *Lackey*, Justice John Paul Stevens observed that in *Gregg v. Georgia*, 428 U.S. 153 (1976) the Court's holding that death was a constitutional punishment was grounded in two ways: 1) the sentence was found permissible by the Framers, and 2) it might serve "two principal social purposes: retribution and deterrence." *Id.* at 183.

In *Lackey*, Justice Stevens said, "It is arguable that neither ground retains any force for prisoners who have spent 17 years under a sentence of death...[T]he additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal... As Justice White noted, when the death penalty 'ceases realistically to further these purposes, ...its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes. A penalty with such negligible returns to the state would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" 115 S.Ct. at 1421-23. In *Lackey*, Justice Breyer agreed with Justice Stevens that the issue is an important undecided one.

In *Arizona v. Richmond*, 886 P.2d 1329 (Ariz. 1994) (En Banc) the Arizona Supreme Court refused to uphold a death sentence for a man on death row for 20 years. Instead, the Court's reasoning included: 1) the fact that the defendant had been on death row for 20 years, 2) the "law governing capital cases has changed significantly since his initial 1974 sentencing and, apparently, so has Richmond," and 3) a review of the aggravation and mitigation in the case. The Court reduced his sentence to the most severe existing at the time of his offense - life without possibility of parole for 25 years.

In *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997), *cert. granted* June 27, 1997, an action under 42 U.S.C. ?1983, the Sixth Circuit determined that since clemency was an "integral part" of the "overall adjudicative system" that the principle of *Evitts v. Lucey*, 469 U.S. 387 (1985) applied. Under *Evitts*, if a state creates a process which is integral to the system, the process must comply with the demands of fourteenth amendment due process and equal protection.

The Ohio Adult Parole Authority (APA) initiated clemency procedures in this case after the denial of the direct appeal and before state post-conviction relief was requested. The APA told Woodard he could have a prehearing interview. Since he had substantial post-conviction remedies available, Woodard was presented with a "'Hobson's choice' between asserting his Fifth Amendment right and participating in the clemency review process." *Woodard* at 1189.

The Sixth Circuit viewed this choice as an "unconstitutional condition," and required on remand that the district court "employ strict scrutiny in analyzing the challenged condition." *Id.* The Court determined that "unless a compelling reason can be brought forward which counsels against applying the [unconstitutional condition] doctrine," Woodard has a "colorable unconstitutional conditions claim regarding the interview procedure...." *Id.*

Three 1997 McQueen cases unsuccessfully challenged the Kentucky clemency process.

In *McQueen v. Patton*, ___ S.W.2d ___ (June 27, 1997), an action before a clemency petition was filed with the Governor, the Court noted that the Governor issued a statement that he would not grant clemency in cases where the death penalty has been recommended by the jury and imposed by the circuit court, and he would not substitute his judgment for that of the legislative, courts and juries. The Kentucky Supreme Court observed that there are "two basic constitutionally mandated requirements under Section 77: 1) that the movant file an application for clemency with the Governor; and 2) that the Governor file with each application a statement of the reasons for his decision." The Kentucky Supreme Court held that despite this announced policy that an application to the Governor for clemency was the "triggering event for action by the Governor; and we will not presume, as does McQueen, that the Governor will refuse to follow the constitutional mandate of ?77 in rendering his decision."

In *McQueen v. Patton*, ___ S.W.2d ___ (June 30, 1997), an action brought after a clemency petition was given to the Governor, the Court held that "the Governor has complied with the requirements of Section 77 of Kentucky's Constitution."

In *McQueen v. Patton*, ___ F.3d ___ (6th Cir., June 27, 1997) the Court held that "the decision to grant clemency is left to the Governor's unfettered discretion and the state has not made the clemency process an integral part of the state's overall adjudicative process."

11. Standard for Granting Clemency

What standard is appropriate for consideration of clemency? In view of the historical and constitutional purposes of clemency, the following standard is offered: *Is there any doubt about the appropriateness of death for this person*, *is the punishment of death truly fair and commensurate with the defendant's blameworthiness.*

Louisiana Governor Buddy Roemer in commuting Ronald Monroe's death sentence on August 16, 1989 stated, "In an execution in this country the test ought not *be reasonable doubt. The test ought to be is there any doubt*?"

12. Death to Life Commutations in Kentucky Since 1920

The following is a chronological listing of the 35 grants of clemency in capital cases by 8 Kentucky Governors from 1920-1967.

GOVERNOR	DATE	DEFENDANT	OFFENSE	REASONS GIVEN IN EXECUTIVE ORDER
Breathitt	12/11/67	Rudolph Hamilton Hassie Cain Martin Johnnie Smith, Jr.	Wilful Murder Wilful Murder Wilful Murder	
Willis	10/09/47	Jack Wright	Wilful Murder	Co-Defendant
	11/03/45	William Elliott	Murder	Conditional; Commutation recommended by court, prosecutor, jurors or other

	01/18/45	Ernest Addington	Rape	Co-Defendant
Laffoon	04/11/35	Stanley Mercer	Wilful Murder	Youth; Good prior criminal record; Personal Aspect of defendant's life
	10/25/34	Houston Jeffries	Wilful Murder	Youth; Good Prior Criminal Record; Particular details of the case; Co-Defendant
	11/08/33	Boone Bowling	Wilful Murder	Characteristics of Victim; Provocation; Commutation recommended by court, prosecutor, jurors or other influential citizens
		Allen Gray	Wilful Murder	Characteristics of Victim; Provocation; Ineffectiveness or Lack of Counsel
	10/18/33	George Lewis	Murder	Characteristics of Victim; Provocation; Personal Aspect of Defendant's Life
	04/05/33	Frank Grenshaw	Wilful Murder	Characteristics of Victim; Commutation recommended by court, prosecutor, jurors, or other influential citizens
	10/13/32	John Wasson	Murder	Psychological Condition of Defendant
Sampson	12/07/31	Oscar Pearson	Murder	Legitimate Claim of Innocence; Co-Defendant
		Ison Gambrel	Murder	Youth; Personal Aspect of Defendant's Life; Commutation recommended by court, prosecutor, jurors, or other influential citizen; Particular details of the case
	12/03/31	William Orndorf	Murder	Particular Details of the Case; Commutation recommended by court, prosecutor, jurors, or other influential citizen; Ineffectiveness or Lack of Counsel
		George McCasland	Murder	Legitimate Claim of Innocence; Commutation recommended by court, prosecutor, jurors, or other influential citizen; Particular details of the case
	12/02/31	Anderson McPerkins	Rape	Legitimate Claim of Innocence
	12/01/31?	? Freeman		
	12/24/30	Lloyd Williams	Wilful Murder	Legitimate Claim of Innocence
		James Grigsby	Murder	Legitimate Claim of Innocence
		John Keller	Murder	Legitimate Claim of Innocence
		Lee Beckam	Wilful Murder	Commutation recommended by court, prosecutor, jurors, or other influential citizen

	12/23/30	Bluford Abbott	Attempted Rape	Conditional; Particular details of the case; Legitimate Claim of Innocence
	9/29/1890	Henry Johnson	Murder	Legitimate Claim of Innocence; Commutation recommended by court, prosecutor, jurors, or other influential citizen
Fields	04/15/24	Sam Archie		
Morrow	12/04/23	Campbell Graham	Murder	Co-Defendant
	06/19/22	Ferdinand Sayre	Murder	Particular details of the case
	05/10/20	Joe Hughes	Murder	Particular details of the case; Commutation recommended by court, prosecutor, jurors, or other influential citizen
	03/23/20	Charles Douthitt	Murder	Personal Aspect of Defendant's Life; Psychological Condition of Defendant; Commutation recommended by court, prosecutor, jurors, or other influential citizen
	??/??/??	A.A. Garman		
Black	12/03/19	Delbert Thomas	Homicide	Personal Aspect of Defendant's Life; Particular details of the case
	11/28/19	Bradley McDaniel	Homicide	Commutation recommended by court, prosecutor, jurors, or other influential citizen
Stanley	??/??/??	Julius Babey	Murder	Psychological Condition of Defendant
	??/??/??	John Ratliffe	Murder	Commutation recommended by court, prosecutor, jurors, or other influential citizen; Legitimate Claim of Innocence

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Juvenile Gangs and Violence: Kentucky Problems Are There Solutions?

Recently I attended one of several sessions on juvenile issues, formed in order to suggest solutions to juvenile problems. The Louisville Bar Association, together with the Cathedral Heritage Foundation and the Louisville Presbyterian Theological Seminary, sponsored these panel discussions. On the day I attended, the topic was gangs and the panel consisted of a Jefferson County Family Court Judge, a Louisville police officer, a social worker, and a "gang infiltrator." Their perspectives and experiences regarding juvenile gang issues in Kentucky follow.

Two observations were made by the gang infiltrator, a man who has purposefully joined gangs nationwide to find solutions to gang violence. He suggests: 1) money and drugs are involved in all gangs, and 2) all gang members are willing to die for their gangs, or their "colors." Nationally, 1500 gangs have been identified. The West Coast spawned the Crips and Bloods, otherwise known collectively as the "People." From the Chicago area are the Disciples and Vice Lords, collectively known as the "Folks." The racial make-up of these gangs is 52% African-American, 32% Hispanic, with the remainder Asian.

Gangs are prevalent in every state in this country, and in many Kentucky cities and towns. This is apparent from the population that makes up Kentucky's juvenile residential treatment centers. For example, in Louisville, gangs used to be "turf" gangs, where neighborhood youth established and defended their geographical boundaries. Now these turf gangs have grown into money and drug gangs, found in both the inner city and the suburbs. Louisville's gang problem became noticeable in 1993, when gang graffiti began to be identified. Gangs infiltrated the Louisville area in four ways: 1) youth moved to the area from California, a mecca of gang activity, bringing gang knowledge; 2) through the system, prisoners are transferred to the area, with family moving also, bringing gang information; 3) active military duty gang members are transferred to Fort Knox (Radcliff has a large gang problem); and, 4) media, especially MTV and "gangsta rap" music.

A theme echoed by each speaker was that all at risk youth - those from dysfunctional families, poverty, abuse, hopelessness- are susceptible to gangs. A Louisville police officer pointed out that gangs are not a law enforcement problem, but a symptom of a problem beginning in the family. Judge Mershon pointed out that Kentucky is one of twenty-three states spending little or no money on prevention. He also advocated implementing five recommendations on preventing violent crime that he read in a juvenile journal: 1) strengthen the family, give guidance to kids; 2) support social institutions, such as schools, social services; 3) promote delinquency prevention, which is cost-effective; 4) act immediately when violent crime occurs; and, 5)

control chronic and violent juvenile offenders.

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The Need for Funding for Trial and Appellate Representation for Kentucky's Juvenile and Youthful Offenders

The story goes that the little boy was beside himself at the chance to finally meet his basketball hero. The star came to the boy's classroom, sat down and spent the morning answering their questions. And when he left, the boy told his mother, the basketball star stood up...and up.

So goes, also, the story for the juvenile crime rate. Up...and up...and up.

Kentucky's Juvenile Crime Figures

"Kentucky reached the national average in a dubious category - violent crimes by juveniles - with an arrest rate that quadrupled in a decade, according to a national study." *The Daily News* Vol. 87, No.31, page 1, May 5, 1997.

The study, conducted by the Annie E. Casey foundation of Baltimore,went on to report that Kentucky had 513 arrests for violent offenses for every 100,000 juveniles aged 10 to 17 in 1994, a 317% increase since 1985. *Id.*

Homicide arrests for juveniles increased 168% between 1984 and 1993 according to data provided by the Federal Bureau of Investigation. "Problems and Solutions to Juvenile Crime" http://westyjr.twn.k12.pa.us/nws99jpk/govt.html. Further, children between the ages of ten and twelve were the age group showing the fastest increase in violent crime. *Id.* Unless the trend is interrupted, demographic experts expect the arrest rate for violent crimes among juveniles to fully double by the year 2010. *Id.*

Need for More Funding for Kentucky's Public Defenders Representing Juvenile Offenders

Kentucky's public defender system is a core component of the Kentucky juvenile justice system. Since *In re Gault*, 387 U.S. 1, 18 L.Ed.2d 529, 87 S.Ct. 1428 (1967) the U.S. Supreme Court has recognized a child's right to assistance of counsel and access to the courts. A consent decree recently entered in *M.K. v. Wallace* mandated that Kentucky make attorneys available inside juvenile treatment facilities to assure access to the courts and to offer some protection with regard to some of the conditions of confinement. However, funding has yet to be allocated to assure due process protections for juveniles in the detention centers scattered

throughout the Commonwealth. *M.K. v. Wallace*, U.S. District Court, Eastern District of Kentucky at Covington, Case No. 93-213. Without the funding to assure sufficient legal representation of the juveniles, the backlog in Kentucky's juvenile judicial system will continue given the burden of the ever increasing numbers of juvenile offenders. It is critical, then, that all aspects of the system be funded to allow justice to flow.

Delays in the life of a juvenile are critical. Delays for juveniles held in detention centers, awaiting trial and possible treatment may mean the difference between rehabilitation and deterioration of mental illness. Inadequate funding means too many juveniles are being transferred to adult court. Attorneys, already overworked with staggering caseloads are too often unfamiliar with juvenile law. Too often, the lack of attorneys skilled in juvenile law has meant that defenses to transfers to adult court were simply not raised. The failure to raise the defense has meant the difference between treatment in a juvenile treatment center and exposure to physical and sexual assault and long term incarceration in an adult facility.

Just in the past few months, Kentucky juveniles have been charged with the murder of a Florida couple, an arson in which three persons died and the death of a Tennessee couple and their young daughter. A common belief is that juveniles who are transferred to adult court are somehow more accountable and that the sentence will be more just. Juveniles tried as adults are not always held more accountable than those tried in juvenile court. It is only in the juvenile treatment centers that comprehensive treatment is guaranteed. This treatment includes individual and group counseling, drug and alcohol treatment, sex-offender treatment, education and, for the many who require it, special education services. Discharge form one of the state's juvenile treatment facilities requires owning responsibility for one's actions. In contrast, studies indicate that teens held in adult facilities revert to crime more quickly after release, commit more crimes and commit crimes of a more serious nature then those treated in juvenile facilities. "Problems and Solutions to Juvenile Crime" *supra*.

Changes Inside Juvenile Treatment Facilities

Changes which have taken place inside Kentucky's juvenile treatment facilities over the past year since attorneys for the youth have been present include a decrease in the use of isolation and in the length of time a juvenile is held in isolation. Prior to this time, no outsiders were permitted in the facilities. Consequently, for years no one questioned what was happening inside the facilities. Stories of abuse were abhorrent enough to eventually attract the attention of the United States Department of Justice. The U.S. Justice Department's investigation led to the filing of a civil rights action in U.S. District Court, a consent decree addressing the conditions inside the facilities and appointment of a federal monitor for the purpose of assuring compliance with the decree. *United States of America v. Commonwealth of Kentucky*, Civil Action No. 3:95 CV-757-S, U.S. District Court, Western District of Kentucky.

While the problems are by no means eradicated, special education programs are being

reviewed now to assist the juveniles in achieving goals which can heighten the likelihood of success in the community. Juveniles who are too mentally ill to benefit from the programs offered have been transferred out of locked facilities and into mental health facilities though this has perhaps not been done as often as need be due to the costs of serving disabled juveniles. Children who have been assaulted, at times to the point of unconsciousness, are now protected by a complaint process and attorneys are available to assist them in this oversight process.

"Crackdown on Crime" Increases the Need for Quality Juvenile Defender Services

For all the good achieved as a result of the consent decrees in *M.K. v. Wallace* and the U.S. Justice Department suit, neither addressed the greatly increased need for funding for the KRS Chapter 31 responsibilities of the Department for Public Advocacy. To paraphrase the theologian C.K. Chesterson's observation, the ideal for legal representation for juveniles charged in the criminal justice system has not been tried and found wanting. It has been found difficult and left untried.

New Risks for Juvenile Offenders

The current mania for "cracking down" on juvenile crime has led to a trend for harsher penalties, easier transfer of a juvenile's case from juvenile court to circuit court, longer periods of incarceration and detention, all with more devastating results for juveniles who are not represented or are not represented well.

House Bill 117, passed during the 1996 legislative session brought about many such changes for Kentucky's young. The prevailing winds of political storms are responsible for similar legislative changes in Washington as Congress seeks to tie federal dollars for prisons to a state's willingness to legislate changes which will force more juveniles to be tried as adults. Angie Cannon, "Congress Takes Up Crackdown on Juvenile Crime," Nation and World, *Lexington Herald-Leader* E Section, page E2, May 9, 1997.

Sending More Juveniles to Adult Prison Will Lead to a Result That No One Really Wants

The need for adequate representation for juveniles serves the community at large. Attorneys, knowledgeable in juvenile law, will effectively question a move to transfer the case to circuit court knowing that transfers to adult court may actually worsen the problem. Conventional wisdom is that the juvenile is being held more accountable in circuit court. But conventional wisdom is wrong. "[B]eing locked up in adult prisons increases, not lessens, their desire to commit crimes. While in the adult prison, the juvenile offender may learn from older, more hardened criminals. When he is released back into the community in his twenties - undereducated, unsocialized, unemployable and at the peak of physical power - he will be the

very model of the very person we wish most to avoid." "Problems and Solutions to Juvenile Crime," *supra*. Cannon, "Congress Takes Up Crackdown on Juvenile Crime," *supra*.

Recommendations

In 1996 the Children's Law Center undertook a study of the status of juvenile defense in Kentucky as a result of a grant awarded by the federal Office of Juvenile Justice and Delinquency Prevention. The study concluded with the following recommendations:

1) The Department for Public Advocacy should provide sufficient resources to increase the number of attorneys providing juvenile defense services to meet recognized standards regarding caseload maximums. This should apply to both full time defender offices as well as contract counties.

2) The Department for Public Advocacy should increase the availability of non-lawyers with special expertise to assist in case planning, treatment issues and mobilizing other resources.

3) In light of the movement toward increased penalties and more severe consequences for juvenile offenders, the Department for Public Advocacy should reassess its allocation of resources to ensure that juveniles receive a fair and equitable portion of funding and other available resources as compared with adult offenders.

4) Local fiscal courts should increase their level of funding for defender services based upon increased need to ensure that adequate resources are available for juveniles to have access to counsel, and are provided with effective assistance of counsel.

For want of a nail, the shoe is lost,
For want of a shoe, the horse is lost,
For want of a horse, the rider is lost...

Bartlett, John, *Familiar Quotations* (Boston: Little, Brown & Co., 1988) p. 270, citing George Herbert.

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Who is Winning the War on Drugs?

Nature and Extent of the Drug Problem

The nature and extent of the drug problem in America is well documented. When President Clinton presented his *1994 National Drug Control Strategy: Reclaiming Our Communities From Drugs and Violence* to the Congress in February 1994, he stated:

> How we address the drug problem says much about us as a people. Drug use and its devastation extend beyond the user to endanger whole families and communities. Drug use puts our entire nation at risk. Our response must be as encompassing as the problem. We must prevent drug use by working to eliminate the availability illicit drugs; treating those who fall prey to addiction; and preventing all our citizens, especially our children, from experimenting in the first place. This is the plan we offer to all Americans.

Lee P. Brown, Director of the Office of National Drug Control Policy, stated in the *1993 Interim National Drug Control Strategy*:

> Drugs continue to break apart society. No parent addicted to drugs or alcohol can adequately care for a child. No child so afflicted can adequately learn in school. No street is safe where drugs predominate. No effort in housing or employment or education or public safety will fully succeed until the target populations are free of drug and alcohol addiction.

Nationally: 67% of Arrests

The Bureau of Justice Statistics 1995 *Sourcebook of Criminal Justice Statistics* indicated a a very high incidence of drug use by arrestees in 23 major U.S. cities. For males the range was from 52% in San Antonio, Texas as to 82% in Manhattan, New York. The incidence among female arrestees ranged from 32% in New Orleans, Louisiana to 82% in Cleveland, Ohio. These drugs included cocaine, opiates, marijuana, phencyclidine (PCP), methadone, benzodiazepine (Valium), methaqualone (Quaalude), propoxyphene (Darvon), barbiturates, and amphetamines. Alcohol was not mentioned.

Kentucky: 45% of Arrests

In Kentucky from 1987 to 1995 *Crime in Kentucky* statistical reports published by the State Police indicated that the number of persons arrested for narcotic drug offenses increased by 95 percent. The average increase for each year was 10 percent. (See Graph 1).

Alcohol is often overlooked in the war on drugs. Alcohol abuse and addiction is a very serious problem in Kentucky. Examination of the State Police's *1995 Crime in Kentucky* report reveals a fact which deserves significant attention from the criminal justice community. By adding 1995 arrests for drunkenness (37,931), driving under the influence (33,118), liquor laws (3,291) and narcotic drugs (17,766), it is found that 92,106 or 43 percent of all arrests (213,333) for Part II Crimes in Kentucky were for drug and alcohol offenses.

The Crisis in Prisons and Jails

It has become clear that the War on Drugs with its funding emphasis on law enforcement without concomitant funding emphasis on treatment and defense of indigents has created alarming problems for jails and prisons. Discussing his crime bill in a news conference President Clinton stated, "We cannot jail our way out of this problem," when asked why he was proposing significant increases in funding for drug treatment and prevention.

Since 1975, the prison population of the United States has more that tripled. This phenomenon has created a funding crisis for federal, state and local governments. The costs of jails and prisons is more than taxpayers can bear.

Kentucky Department of Corrections data indicate that the cost of keeping a person in jail or prison for a year is $13,613.30. The Department of Corrections annual *Profile of Institutional Population* reports show that Kentucky's prison population has increased by 49% in the past nine years, rising from 5,221 in 1987 to 11,977 residents in 1996. (See Graph 2).

On July 31, 1994 an editorial in the *Louisville Courier Journal* revealed that the Jefferson County Jailer was forced to release prisoners prior to the expiration of their sentences due to Federal Law on prison overcrowding. This is occurring in spite of the fact that one fifth of the Jefferson County Government's budget is spent on corrections.

Problems Associated with Multiple Defendant Drug Cases

The increases in arrests for drug offenses in Kentucky from 9,213 in 1987 to 17,776 in 1996 has placed a severe strain on the resources of the public defender system. This is especially true in multiple defendant drug cases resulting from drug sweeps by the police in numerous counties.

Kentucky State Police officials indicate that they conduct as many as twelve drug sweeps per year. The number of people arrested in any given sweep depends upon the size and population of the jurisdiction in which the sweep is made. The number of arrestees usually ranges between 12 and 50. In one statewide drug sweep the Kentucky State Police arrested 687 people.

Case law has clearly established that in a situation in which there are multiple defendants one attorney cannot represent more than one client where there is a conflict of interest or even a potential conflict of interest. In some situations the attorney who makes the initial contact with multiple defendants in a multiple defendant case may not be able to represent any of them due to multiple conflicts.

The DPA provides constitutionally mandated criminal defense services throughout the Commonwealth. In these counties where drug sweeps occur an inordinate amount of defender resources are used in multiple defendant drug cases. Funds are not sufficient to provide legal representation through outside counsel to handle the cases in conflict situations caused by multiple defendant drug sweeps. When dealing with multiple defendants, locating conflict attorneys using existing resources is a problem that results in considerable delay in processing these cases in court.

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District Court Practice: Trials in Absentia

In 1996 I represented a client who was charged with felony driving under the influence and felony driving on a DUI suspended license. The facts of the case didn't look promising. He was stopped alone in the car by a Kentucky State Trooper, he failed all field sobriety tests and a breathalyzer result registered well over the legal limit of .10 BAC. A copy of his driving record from the Kentucky Department of Transportation indicated that he had three previous convictions within the five year time limit. However, my client insisted that he did not, in fact, have three convictions but rather only two. After obtaining certified copies of all three judgments, I discovered the reason for my client's insistence that "this couldn't be a felony." In 1992 he was convicted at a bench trial held in his absence and still had a pending jail sentence of 90 days.

My client's response to the bad news was somewhat predictable... "What? They can't do that! What about my right to testify? My right to an attorney? And my right to confront and cross-examine my accusers?" Well, that might not be an exact quote, but I'm sure that is what he meant. Moreover, his disbelief was only heightened by my less than reassuring answers. Not only has the United States Supreme Court upheld certain misdemeanor judgments rendered in a defendant's absence, but the Kentucky Rules of Criminal Procedure specifically allow such trials in misdemeanor cases.

Is RCr 8.28 Constitutional?

Kentucky rule of criminal procedure 8.28(4) states that "[i]n prosecutions for misdemeanors the court may permit arraignment, plea, trial and imposition of sentence in the defendant's absence." The reason cited for this rule is to ensure that the Commonwealth is not delayed in the prosecution of minor offenses. See *Barnett v. Russell*, 185 S.W.2d 261 (Ky. 1945). While such a rule is publicly justified on the grounds of judicial economy, this prosecutorial vigilance often contradicts the foundational constitutional requirements of an accused's right to be heard; to demand the nature and cause of the accusations against him; to meet witnesses face to face; and to have compulsory process for obtaining witnesses in his favor.

Are trials in absentia inherently unconstitutional? The answer is clearly no, if the charge is a misdemeanor. In *Willock v. Commonwealth*, 435 S.W.2d 771 (Ky. 1968), *cert. denied*, 393 U.S. 1067, 89 S.Ct. 723, 31 L.Ed.2d 711, the Court held that in misdemeanor cases it is enough that the defendant have an opportunity to be present at his trial, and if he chooses not to appear, his constitutional rights have not necessarily been violated. Three years later, the Court reaffirmed this view by succinctly stating that trial of a misdemeanor charge in the absence of the

defendant is not, in itself, unconstitutional. *McKinney v. Commonwealth*, 474 S.W.2d 384 (Ky. 1971).

In concurrence with other jurisdictions, Kentucky courts have refused to extend this rule to felonies. The constitutional requirements of Section 11 of the Kentucky Constitution may be waived in misdemeanor cases by absence from trial, but not in felony cases. *Davenport v. Commonwealth*, 368 S.W.2d 327 (Ky. 1963). This distinction led to a challenge to RCr 8.28 on the grounds that the authorization of trial of misdemeanor cases in absentia but not felony cases was a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Court rejected this argument by finding that there was no "infringement upon fundamental rights of persons charged with misdemeanors because, under the rule, their trial in absentia will not stand unless they waived the right to be present. There is no deprivation as to them of any constitutional right afforded to persons accused of felony; the rule provides only that the latter may not waive the right." *McKinney v. Commonwealth*, 474 S.W.2d at 387.

What Constitutes A Waiver of the Right to be Present at Trial?

In deciding whether or not a defendant has waived his right to be present and may be tried in his absence, courts have focused on whether or not the defendant's absence was "voluntary." See *Butcher v. Commonwealth*, 276 S.W.2d 437 (Ky. 1955); *Barnett v. Russell*, 185 S.W.2d 261 (Ky. 1945). There is no conclusive presumption of voluntariness from the mere fact that the defendant is absent from the courtroom on the date of trial. *McKinney v. Commonwealth*, 474 S.W.2d at 386. If the Commonwealth can prove the defendant knew of the trial date and did not appear, an inference "may be indulged that the absence was intentional, knowing and voluntary" and consequently a waiver of the right to be present." *Burns v. Commonwealth*, 655 S.W.2d 497 (Ky.App. 1983). However, because of the serious nature of waiving individual constitutional rights, the inference is rebuttable. In a totality of the circumstances test, the defendant bears the burden of explaining that his absence was not voluntary. Courts will find that a wavier occurred only if the defendant's actions are "so clear and unequivocal as to indicate *conscious intent to be absent*." *Id.* at 498 citing *Powell v. Commonwealth*, 346 S.W.2d 731 (Ky. 1961). Because of the high standard of proving "conscious intent," Kentucky appellate courts disfavor upholding trials in absentia based on absence alone.

In *Burns*, the defendant was arrested on December 31st and charged with misdemeanor theft by unlawful taking and resisting arrest. After appearing for arraignment on January 2nd, his case was set for trial on January 20th. On the scheduled day of trial the defendant did not appear at the call of his case and his appointed public defender admitted he had not had any contact with the defendant since his arraignment. The court overruled the public defender's motion for a continuance, tried the defendant in his absence, found the defendant guilty on both counts and sentenced him to 90 days in jail and a $100 fine. Approximately ten minutes after the judge's verdict, the defendant appeared in court and explained that he believed his court

trial was the following day, January 21st; that he had written that date on a card; and that he had tried to contact his attorney, but had never been able to reach him. Despite the defendant's apparent unintentional, good faith mistake, the trial court judge overruled the defendant's motion to set aside the conviction and grant a new trial by concluding that the defendant acted in "bad faith in failing to contact counsel."

The appellate court reversed by finding that the facts were not so clear and unequivocal as to indicate a conscious intent to be absent. "[T]he failure of the trial judge to sustain the appellant's motion for a new trial where the merits of his defenses to the charges against him could be constitutionally adjudicated, not only violates his rights protected by the constitutions of the United States and the Commonwealth, it also offends traditional notions of fair play and substantial justice."

Factors to Determine Voluntariness of Absence

The following is an analysis of factors Kentucky courts have used to determine whether or not the defendant's absence was voluntary:

a. **Illness.** A court is without power to try the defendant in his absence on a misdemeanor charge, where such absence was the result of a genuine and verifiable illness. In *Robinson v. Commonwealth*, 234 S.W.2d 296 (Ky. 1950), the court held it was error to try the accused in his absence when the defendant's attorney appeared at the call of the case and explained that he had learned that morning that his client was ill and unable to attend his hearing. At a minimum the court should have allowed the attorney the opportunity to secure affidavits to verify the defendant's condition to support a motion for continuance. See also *Fleming v. Commonwealth*, 280 S.W.2d 148 (Ky. 1955).

However, when the defendant makes no effort to inform the court of his or her illness and subsequent inability to attend trial or is unable to verify the illness by sworn testimony, the court may uphold a verdict rendered in a trial in absentia. See *Hensley v. Commonwealth*, 276 S.W. 1061 (Ky. 1925) and *Talbott v. Commonwealth*, 270 S.W. 32 (Ky. 1925).

b. **No Knowledge of Trial Date.** Kentucky courts have refused to find that absence from trial is voluntary when the defendant had not been properly served with process and no proper return had been made. *Bartram v. Commonwealth*, 298 S.W. 939 (Ky. 1927). In *Butcher v. Commonwealth*, 276 S.W.2d 437 (Ky. 1955), the court set aside a conviction where it was shown that both the defendant and his attorney were without knowledge as to the scheduled trial date. Finally, in *Little v. Commonwealth*, 481 S.W.2d 649 (Ky. 1972), the court held that the

defendant was entitled to a new trial where the record contained no order indicating the defendant was to appear on the date on which the trial was in fact held.

c. **Accused in Jail.** Clearly, a defendant has not validly waived his constitutional rights when he is imprisoned elsewhere during his trial. *McCoy v. Commonwealth*, 291 S.W. 1063 (Ky. 1927). In *Wallen v. Commonwealth*, 264 S.W. 1106 (Ky. 1924), the court overruled the prosecution's argument that the defendant had somehow waived his constitutional right to be present at his trial by committing a crime in another county by reminding the Commonwealth Attorney that the fact that the defendant was guilty of another offense in a separate county was not a sufficient reason for denying the accused the presumption of innocence and a fair trial on his other charges.

d. **Enhanceable Offense.** Although no Kentucky case is directly on point, a logical argument can be made that a trial in absentia would be invalid for any offense in which an enhanced penalty may be imposed for a subsequent conviction. This can be done by analogizing to the courts' rejection of guilty pleas where the defendant was not present at the entry of plea to waive his constitutional rights.

In *Woods v. Commonwealth*, 793 S.W.2d 809 (Ky. 1990), the Kentucky Supreme Court ruled that it is an abuse of discretion to accept a plea of guilty in absentia for any offense which could be used to enhance a subsequent conviction. In examining whether or not a prior conviction may be used to enhance a subsequent offense the court must determine if the prior plea was entered knowingly, intelligently and voluntarily under the standards set forth in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Where the defendant challenges the validity of a prior conviction for enhancement purposes, his federal constitutional rights must take precedence over the State's rules of procedure permitting trial of misdemeanors in absentia. Kentucky courts have found that the defendant's absence from the courtroom during the entry of the plea fails to meet that standard for all enhanceable offenses. See also *Tipton v. Commonwealth*, 770 S.W.2d 239 (Ky.App. 1989).

Does the Defendant Have a Right to a Jury Trial?

Because courts are usually trying to conserve judicial resources in applying RCr 8.28, they will routinely try the defendant in a bench trial in his absence rather than a jury trial. While no case law in Kentucky has directly addressed the issue, the United States Supreme Court has indicated that the right to a jury trial in criminal cases is held to be so fundamental to our basic system of jurisprudence and justice that the Fourteenth Amendment to the United States

Constitution guarantees such a right. "[W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment's guarantee... The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process clause of the Fourteenth Amendment, *and must be respected by the States*." *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444 (1968).

The Supreme Court has held that this right to a jury trial is not absolute. In determining whether the seriousness of the punishment requires a jury trial, the critical factor is the length of the sentence authorized and not the length of the penalty actually imposed. In the federal court system only "petty offenses" which carry a maximum jail sentence of six months or less have historically been exempted form the jury system. See *Duncan*, 391 U.S. at 158. Therefore, the Court concluded that in any prosecution which exposes the defendant to a possible punishment of more than six months incarceration, there is an absolute right to a jury trial.

Kentucky courts have complied with federal due process by extending the right to jury trial to all non-petty offenses. See *City of Mt. Sterling v. Holly*, 57 S.W. 491 (Ky. 1900). While no Kentucky case has answered the question of whether or not a bench trial in absentia is valid in a non-petty offense, the dicta in *Donta v. Commonwealth*, 858 S.W.2d 719 (Ky.App. 1993), raised concerns that such trials may be unconstitutional. The court held that a violation of KRS 522.030, official misconduct, which carried a maximum fine of $250.00 and jail sentence of 90 days, did not guarantee the defendant a right to a jury trial. In allowing the defendant's conviction in a bench trial held in his absence to stand, the court noted that the federal justice system defines a "petty offense" as any crime punishable by no more than six months in prison and a $500.00 fine. Thereby, implying that if a violation of KRS 522.030 carried a maximum sentence of more than six months rather than ninety days, the defendant would have been entitled to a jury trial as a matter of law under the Kentucky Constitution.

Since all Class A misdemeanors carry a maximum of one year in the county jail, it is arguable that all are non-petty offenses. Defense attorneys should raise this issue in any conviction resulting from a bench trial held in a defendants absence pursuant to RCr 8.28.

Conclusion

While holding misdemeanor trials in a defendant's absence fulfills the goal of judicial economy, it often comes at the expense of constitutional guarantees. The appellate courts reluctance to uphold such convictions is indicative of the limited purpose for which RCr 8.28 was introduced: to prosecute defendants who consciously and intentionally waive their right to a jury trial.

And as for my client? Since the trial in my client's absence was a bench trial on enhanceable offenses, DUI and driving on a DUI suspended license, which carried a possible punishment of

one year in county jail, the Judge correctly vacated the judgment and granted a new trial which eventually resulted in a dismissal of the charge. While the idea of misdemeanor post-conviction relief can make the most litigious of us cringe, the failure to explore such avenues can be costly to our clients and to our effort to protect and preserve the Constitution.

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Plain View

Chandler v. Miller

The United States Supreme Court has issued its third and fourth opinions of this term. In an 8-1 opinion written by Justice Ginsburg, the Court has held that candidates for public office cannot be forced to take a mandatory drug test.

The case arose from a Georgia law which required candidates for certain offices to submit to drug testing. The question for the Court was whether this law met the special needs criteria previously established by the Court for suspicionless searches. The answer was that it did not.

Acknowledging that the law required a search, the question posed by the majority opinion was whether the search was a reasonable one. "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing...But particularized exceptions to the main rule are sometimes warranted based on 'special needs, beyond the normal need for law enforcement.'"

The Court arrived at the reasonableness inquiry by "examining closely the competing private and public interests advanced by the parties." The public interests met by the law fell far short of previous suspicionless searches justified by the Court. See *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990), *Vernonia School Dist. 47J v. Acton*, 515 U.S.___(1995), *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989). "Our precedents establish that the proffered special need for drug testing must be substantial -- important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion...Georgia has failed to show...a special need of that kind."

Justice Rehnquist penned a solitary dissenting opinion. In his opinion, Georgia as the sole state to implement such drug testing had a right to do so, and the resulting search was reasonable under precedent. "Nothing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the members of this Court."

***Richards v. Wisconsin*,**
117 S.Ct. 1416 (1997)

In its fourth opinion of the term, the Court delivered a strong message to those that thought that knock-and-announce had no teeth.

Wilson v. Arkansas, 514 U.S. 927 (1995) held that when executing a warrant, the common law as incorporated into the Fourth Amendment required officers to "knock on the door and announce their identity and purpose before attempting forcible entry."

The Wisconsin Supreme Court interpreted *Wilson* to say that "police officers are *never* required to knock and announce their presence when executing a search warrant in a felony drug investigation." This interpretation was invited by *Wilson*, which had rejected a "rigid rule" for a more fluid knock-and-announce rule that recognized exigencies of law enforcement.

Justice Stevens wrote for a unanimous Court overturning the Wisconsin Supreme Court's blanket "drug exception" to *Wilson*. While the Court acknowledged that often drug cases involved threats of physical violence to officers during the execution of warrants, that fact did not dispense with "case-by-case evaluation of the manner in which a search was executed."

Following *Richards* and *Wilson*, the rule is that "in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement. In order to justify a 'no-knock' entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."

This holding, however, had little impact on Richards himself. Because of the circumstances of the Richards case, there was evidence that Richards knew the persons at the door were the police and that Richards might destroy evidence if they waited at the door. Thus, the police could enter without knocking and announcing their presence.

Interestingly, the magistrate who signed the warrant had explicitly denied the police request to make a "no-knock" entry. The Court did not find this fact persuasive. "[T]his fact does not alter the reasonableness of the officers' decision, which must be evaluated as of the time they entered the hotel room."

It appears that knock-and-announce is here to stay. It is up to defenders to ensure that this rare new case law that helps the accused is rigorously asserted.

Foley v. Commonwealth

The Supreme Court addressed one search and seizure issue in its opinion in the capital case of *Foley v. Commonwealth*. Justice Stumbo wrote for a unanimous court on April 28, 1997.

Here, bodies were found in a cistern located on property titled following the murders to John

Foley, Robert Foley's father. It was located near the cabin owned by David Gross. Lonnie Owens discovered the bodies after hearing that bodies were located at the Gross residence. He executed a search warrant, which turned up nothing. Thereafter, a resident of the cabin gave a consent to search. A week long search turned up nothing. Thereafter, Owens went back to the property and noticed a depression on the Foley side of the property 50-100 feet from the Gross cabin. He dug down 2 1/2 feet and found human remains. He then obtained a search warrant, the execution of which resulted in the finding of the bodies.

The Court found that the questions involved in the search were fascinating. "[T]he question of whether a reasonable expectation of privacy can exist in regard to the contents of a cistern located on property not held in one's name is an interesting one, with many subtle sub-issues..." However, the Court resolved the case with a simpler holding. The Court held that Foley had not met his burden of establishing standing, that is that he had a reasonable expectation of privacy in the cistern located on land owned by his father. Further supporting the Court's holding was that the cistern was not part of the curtilage, that it was "rural, open property that appeared to be abandoned and unoccupied and which the officer conducting the search believed belonged to the

estate of a man with no immediately discernable connection to Appellant."

United States v. Mauldin

The Sixth Circuit Court of Appeals in this case reviewed a mundane street occurrence, and found the police action to have been warranted. Here, an informant called the police to state that Mauldin was in a particular place in a gold Jaguar with a "'bunch of dope' in a black pouch in the car." The officer knew the informant, the informant had been reliable in the past; the officer also knew that Mauldin had previously sold drugs to an undercover officer in the recent past. The informant called two more times telling the police where Mauldin was. Mauldin was eventually stopped in his gold Jaguar; he was seized and contraband was discovered.

The Court of Appeals, in an opinion written by Circuit Judge Godbold, found that Mauldin had been legally stopped. The officers "had an articulable reasonable basis to suspect criminal activity that permitted them to make a Terry stop of Mauldin's car." The Court further found that it was not required, "in order to make a valid Terry stop, that the informant must have precisely stated how he acquired the knowledge that he conveyed."

Short View

1. ***United States v. Jerez***, 60 Cr.L. 1532 (7th Cir. 2/27/97). The police can invoke the Fourth Amendment by knocking persistently in the middle of the night on the door and window of a motel room. By knocking persistently, the police turned what would otherwise have been a consensual encounter requiring no level of suspicion to one requiring at least an articulable suspicion. The resulting discovery of cocaine in the motel room had to be suppressed as a result. "We hold that the totality of the circumstances surrounding this encounter--the late hour of the episode, the three minutes of knocking on the door, the commands and requests to open the door, the one-and-a-half to two minutes of knocking on the outside window, and the shining of the flashlight through the small opening in the window's drapes onto the face of Mr. Jerez as he lay in bed--makes clear that a seizure took place...A reasonable person in their situation could conclude only that the deputies would not leave unless the door was opened."

2. ***United States v. Palacios***, 60 Cr.L. 1557 (DCSNY 3/7/97). The failure to follow FBI guidelines regarding the manner in which an inventory search was conducted of persons who were arrested led to the suppression of evidence in this case involving the charge of murder. Here, two agents conducted inventory searches of two defendants in altogether different ways, demonstrating their use of discretion. "[I]nventory searches cannot be generalized rummaging for evidence...An inventory is no substitute for obtaining a warrant."

3. ***Commonwealth v. Hawkins***, 61 Cr.L. 1120 (Pa.Sup.Ct. 4/22/97). The Pennsylvania Supreme Court has held that an anonymous tip that someone has a gun, without there being any evidence of a crime, is not sufficient to conduct a *Terry* stop, as a matter of state constitutional law."The fact that the subject of the call was alleged to be carrying a gun, of course, is merely another allegation, and it supplies no reliability where there was none before. And since there is no gun exception to the *Terry* requirement for reasonable suspicion of criminal activity, in the typical anonymous caller situation, the police will need an independent basis to establish the requisite reasonable suspicion."

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Voir Dire in Jury Selection in Death Penalty Cases: An Efficient Tool

In a death penalty trial which began on April 28, 1997 in Metcalfe County, Kentucky, *Commonwealth of Kentucky v. Ralph Timothy Barlow* and *Ones LeRoyce Barlow*, Indictment No. 96-CR-41, an efficient procedure for voir dire in death penalty cases was instituted pursuant to the prudent supervision of Judge Benjamin L. Dickinson of the 43rd Judicial District.

During the pretrial motion period, several weeks before the trial began, attorney John P. Niland made a motion for the Court to send out an expanded version of the usual questionnaires sent to all jurors in all counties in Kentucky. The purpose of this measure was to acquire additional information beneficial to both parties in this death penalty case which would increase the quality, efficiency, and speed of the voir dire process. A copy of the questionnaire follows this article.

The Court, defense, and Commonwealth all agreed that this procedure was beneficial to both sides and resulted in a better method by which to select the jurors in this death penalty case.

The motion made by Mr. Niland before Judge Dickinson was not objected to by Commonwealth Attorney Phil Patton as he, too, thought that the procedure would be useful and efficient for the voir dire process in this death penalty case.

The questionnaire attempts to streamline questions specifically referred to in the Kentucky Rules of Criminal Procedure. RCr 9.38 states:

> ...When the Commonwealth seeks the death penalty individual voir dire out of the presence of other prospective jurors is required if questions regarding capital punishment, race or pre-trial publicity are propounded. Further, upon request, the Court SHALL permit the Attorney for the Defendant and the Commonwealth to conduct the examination on these issues. (emphasis added). (Effective January 1, 1997).

The Court and the parties all agreed after the trial that this procedure was extremely helpful.

In *Barlow*, *supra*, Judge Dickinson after several hours of settling into the individual voir dire procedure in this death penalty case began doing the majority of the questioning to the individual jurors. Judge Dickinson was extremely open to allow attorneys to follow up on any questions that he asked or any particular answers received by the jurors, as all parties were aware of the fact that the new criminal rule in Kentucky says that attorneys SHALL be permitted by the Court to do their own individual voir dire.

Regarding the questionnaires which the Court ordered the Clerk to have sent out to all prospective jurors in this death penalty case (which was approximately 120) the parties were able to have access to the extended questionnaires filled out by prospective death penalty jurors at least two weeks before trial. The Court probably would have allowed more time but the motion to have the Court do this was only made approximately three weeks before trial.

The advantages of having the extended voir dire Questionnaires sent to prospective death penalty jurors are many.

The process allows both the Commonwealth and the Defense advanced notice regarding questions which are specifically authorized by RCr 9.38. Again, this would be death penalty opinions, racial opinions, and pre-trial publicity issues. By having the additional information, much time can be saved with each individual juror because many of the questions are already asked and are in the hands of the attorneys well before trial. Although the time utilized by the attorneys themselves might increase overall due to the additional study of the extended questionnaires, the time actually used in Court is substantially reduced to select the jury.

Before writing this article I obtained specific permission from Judge Dickinson as well as Commonwealth Attorney Phil Patton to use both their names and cite their opinions as to the workability of this death penalty voir dire procedure.

Judge Dickinson was extremely pleased with the way that the voir dire went in *Barlow*. He particularly liked the method that we used wherein he asked the majority of the questions but still allowed attorneys to have any questions that they felt important to be presented to jurors. He also picked up on the questions asked by individual attorneys to jurors during the process and began asking them himself to save embarrassment for the attorneys. I am authorized to report to you by Judge Dickinson that he was extremely pleased with this voir dire procedure.

I also specifically contacted Commonwealth Attorney Phil Patton for his permission to use both his name and his opinions regarding this procedure. Commonwealth Attorney Patton felt that the procedure was beneficial to both sides. he also felt that the procedure of being allowed to use the extended written voir dire questionnaire and having access to it before trial was of great benefit to both parties. Phil also agreed with me that we probably saved anywhere from 4-6 hours to a day and a half or so in the entire death penalty voir dire process because of the advance information ordered given to the attorneys. Commonwealth Attorney Patton also emphasized that he liked the procedure because it reduces the likelihood of either the Commonwealth or the Defense offending a juror with some of the questions that have to be asked in death penalty cases.

Through discussions that were had among the Defense attorneys during trial, John P. Niland, Randall Bentley and myself, I can safely report that all parties for the Defense were also pleased with the use of this efficient tool in death penalty voir dire.

Remarkably, the very same procedure has now been allowed and adopted in the case of *Commonwealth v. Outh Sananikone, et al*, Indictment Number 96-CR-599-003 in a death penalty case scheduled to be tried in Warren County. A motion was made by defense counsel J.J. Hall and myself. Lead Counsel for the prosecution, Assistant Commonwealth Attorney "Kit" Hancock, had no objections and has asked to supplement the voir dire questionnaire with some more questions that he wishes to have asked. At present it appears that all parties are in favor of the questionnaire which will benefit all parties towards receiving a fair trial in such a serious case.

A jury questionnaire improves the fairness, quality, and efficiency of the jury selection process in death penalty cases.

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JUROR'S PERSONAL DATA QUESTIONNAIRE

1. Name _____ 2. Age: _____

3. Home address:
_____

4. Have you lived at any other address in the last 5 years: _____

If so, what address: _____

5. Years of residence in Kentucky: _____; county: _____

6. Occupation: _____

7. What do you do at your job? _____

8. For whom else have you worked in the last five years?
_____

9. Marital status: _____

How many times have you been married? _____

10. Spouse's name: _____

Spouse's Occupation: _____

Spouse's Employer: _____

11. For whom else has your spouse worked in the last five years? _____

12. List all members of your immediate family:

Name Relationship Age Occupation Employer

_____

_____

_____

13. Have you or any member of your family, friends, neighbors, or co-workers been a victim of a crime? _____
If so, explain: _____

14. Have any of you been charged with a criminal offense other than a violation or minor traffic offense? Yes _____ No _____

If so, what:_____

15. Are you, or any member of your family, related to or a close friend of any law enforcement officer? Yes _____ No _____

If so, list who:_____

16. Have you ever served as a juror before? _____ How often? _____
Was this a civil or criminal case? _____
Did you appear on behalf of the plaintiff (or state or prosecution) _____ or the defendant? _____

17. Have you ever been a witness before? _____ How often? _____

Was this a civil or criminal case? _____
What was the result of that case? _____

When did you serve? _____

18. Have you ever served on the grand jury? _____ When? _____

19. Do you (1) own house? _____ (2) rent? _____ (3) live with someone else? _____

(4) other: _____

20. How much education have you completed?

Grade school _____ High school _____ College _____

Graduate work _____ Major? _____ Degree _____

21. How do you keep up with the news? Radio _____ T.V. _____

Newspaper _____ None _____ Which? _____

22. Do you read newspapers? Regularly _____ Somewhat _____

A little _____ None _____ Which _____

23. Which T.V. news programs do you watch more? Local news _____

National news _____ Both about the same _____

None _____

24. Indicate whether you have any problem with hearing: _____

eyesight: _____
or any other medical problem:_____

25. Please list any official positions you hold *or* any organizations or associations to which you belong such as PTA, social clubs, national organizations:
_____

26. Please list any such official positions, organizations, *or* associations to which your spouse belongs:

_____

27. Religious affiliation:
_____

Spouse's religious affiliation: _____

How often do you attend church:
_____

What office or position do you hold in church: _____

28. Have you or any member of your family ever made a claim for personal injury or been sued by someone else? _____ Describe:
_____
_____

29. When you are present for jury service, does your employer continue to pay you?

____ Yes ____ No

30. Do you know the Commonwealth Attorney or County Attorney, or any of their relatives, friends or staff?
____ Yes ____ No
If so, who do you know?
_____

31. If you are retired, what was your previous occupation?
_____

32. Do you plan on changing jobs in the near future?
_____

If so, to what job?
_____

33. Have you taken any courses in any of the legal fields? (paralegal, law, corrections, law enforcement)?
If so, please identify:
_____

34. Have you ever been a boss or a supervisor? _____ If yes, please describe:

_____

35. Would you describe yourself as a leader or a follower?

_____

36. Have you had any military experience? _____ If so, where and when?

_____

37. What other jobs have you had in addition to your present job?

_____

38. If you are registered to vote, did you register as a Democrat, Republican or Independent?

_____

39. Do you support any cause, either by donating money or time to it? _____ If yes, please explain:

_____

40. In your opinion, what if anything is wrong with the criminal justice system:
_____

_____

41. Are you opposed to the drinking of beer, wine or whiskey?
_____

42. What do you think of others who drink beer, wine or whiskey?

_____

43. What do you think of others who take illegal drugs?

_____

44. Do you think that people will do things under the influence of drugs or alcohol that they would not do if sober?
_____

45. Do you feel that a person should receive less punishment if they commit a crime while under the influence of drugs or alcohol? _____ Please explain:
_____
_____
46. Have you ever had a close friend who was of a different race than you, black, white, hispanic, asian?
_____

47. Have you ever invited a person of another race into your home? _____ If so, how often?
_____

48. How do you feel about a person of one race dating or marrying a person of another race?

_____

49. Is there any reason why you feel that you should not sit on this jury?

_____

50. Do you have a special reason for wanting to serve on this jury?

_____

51. Is there any matter not covered by this questionnaire that you feel you should tell us about?

_____

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The "To Do" List:
Don't Make the Thirteen Worst Mistakes Other Death Penalty Lawyers Make[1]

1. Do prepare and submit a jury questionnaire. Even if the judge does not accept it, you will be prepared on the first day of the trial.

2. Do compare your questionnaire to some of the most famous questionnaires, *e.g.*, O.J. Simpson, Noriega and the civil questionnaires.

3. Do use questions pertaining to racial and ethnic discrimination on the questionnaire. Don't pick a jury with your head in the sand.

4. Do include questions pertaining to mitigation. This is *not* an admission of guilt.

5. Do go to your psychology, social work, or sociology library for prior studies. It is best not to reinvent the wheel, but to rely on high quality research. Hundreds of studies exist on attitudes toward the death penalty, racial discrimination, child sexual abuse, lawyers, police officers, doctors, illegal drugs, battered woman syndrome, stabbing, bingo, politicians, and almost anything else. Do not be conned by lawyers who rely only on intuition.

6. Do read a book on jury questionnaire construction. The standards for writing good questions are laid out.[2]

7. Do a pretest. Questions work differently in different regions. Some questions from more progressive states may actually be detrimental if you are in the Midwest or the South. Never take a questionnaire to court without seeing how it works. Your judge may not want to use one ever again.

8. Check to see what the other criminal and civil questionnaires are like in your state. You wouldn't want your death penalty questionnaire to be shorter than a contract questionnaire for the Harlem Globe Trotters.

9. Do hire a jury consultant if you client has some, but limited resources. A jury consultant can do higher quality work in a shorter period of time. Civil clients now recognize the importance of cost-effective approaches. Courts like experts who charge less per hour than lawyers.

10. Submit a motion for why you want a questionnaire.[3] A list of reasons for the use of the

questionnaire is important. Let the judge know that you will not ask for one in every case, just for the critical cases.

11. Use small old words. Make sure that as many of the words as possible are ones that the jurors understand. They need to have the same meaning for everyone to be valid.

12. Use sentences that are short. Most survey research uses sentences that are less than twenty words per sentences. Know the rules for making exceptions.

13. Each death penalty questionnaire should be different. Do not submit the same questionnaire for each and every case. A cult murder is different from a serial killer. A battered woman case is different from a shaken baby case. Black on white is different from white on black. A bar fight is different from a stabbing in a bedroom. The variations are infinite.

Footnotes

[1]This article applies to many criminal defense cases.
[2]*SURVEY QUESTIONS: Handcrafting the Standardized Questionnaire*, Jean M. Converse and Stanley Presser.
[3]*How to Save Your Client and the Court Time*, published in Tennessee as well as some fifteen states.

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Access to Counsel at Executions Litigated

The attorney/client relationship and full access to counsel are fundamental to our system of justice. During the day preceding the execution of Harold McQueen full access to his counsel was denied by the Warden and the Department of Corrections. By affidavit, the Warden stated:

"1. That on the evening of June 29, 1997, I met with Harold McQueen to discuss his schedule of visitors during the day of June 30, 1997.

2. That the following schedule was reviewed and found to be acceptable by Harold McQueen:

7:30 a.m. - 2:30 p.m. Family
2:30 p.m. - 4:00 p.m. Attorneys
4:00 p.m. - ? Clergy

3. That Harold McQueen has a telephone available to make calls to his attorneys anytime he so chooses.

4. That if Harold McQueen wants to see his attorneys after 4:00 p.m., such a request will be considered.

5. If an emergency exists that is articulated by Harold McQueen's attorneys, and he agrees to meet with an attorney, that request will be accommodated."

Litigation before the Lyon Circuit Court resulted in the following order:

"HAROLD MCQUEEN, JR. PETITIONER

VS. **ORDER**

PHIL PARKER, WARDEN RESPONDENTS
KENTUCKY STATE PENITENTIARY
DOUG SAPP, COMMISSIONER,
DEPARTMENT OF CORRECTIONS

AND

DANIEL CHERRY
SECRETARY OF JUSTICE CABINET

Based on the attached Affidavit, IT IS HEREBY ORDERED AND DIRECTED that Warden Philip Parker, Kentucky State Penitentiary, Eddyville, Kentucky, shall afford attorneys for Harold McQueen, Jr. scheduled to be executed on July 1, 1997, access to McQueen as follows:

1) Warden Philip Parker shall afford attorneys for Harold McQueen, Jr. access to McQueen from 2:30 to 5:30 p.m., June 30, 1997, for conference and consultation in person;

2) Upon his request, Harold McQueen, Jr. will be allowed to see his attorneys after 5:30 p.m. on June 30, 1997, in person, if it is deemed necessary by General Counsel for the Department of Corrections;

3) Furthermore, if attorneys for Harold McQueen, Jr. articulate a legal basis satisfactory to General Counsel for the Department of Corrections to confer with Harold McQueen, Jr. in person after 5:30 p.m. on June 30, 1997, such request shall be accommodated by Warden Phil Parker, Kentucky State Penitentiary; and

4) A telephone shall be made available to Harold McQueen, jr. at all times for telephonic communication with his counsel up until the time of his execution. This means that Harold McQueen, Jr., may telephone his attorneys and his attorneys may telephone him.

The Court considers the legal position of General Counsel for the Department of Corrections as neutral as to the rights afforded to the condemned, Harold McQueen, Jr., concerning his pending execution. The sole responsibility for the Counsel for the Department of Corrections is advising Warden Philip Parker, Kentucky State Penitentiary, in properly carrying out all lawful Court Orders.

The Respondents are charged with the awesome responsibility of carrying out the Orders of the Courts, not only in regard to the Petitioner's legal rights, but also with a sensitivity to those personal and spiritual needs, if any, which he may have. This Order balances and accommodates both of those needs as well as humanly possible.

For these reasons, the Motion to Compel Respondents to Afford Petitioner Full Access to Counsel which may be inconsistent with this Order, as well as the Motion for Stay of Execution Pending a Full Hearing are DENIED.

This 30th day of June, 1997.
Bill Cunningham, Circuit Judge"

That order was amended as follows:

"The Court's Order entered this date in the above styled action is AMENDED so that Barbara Jones, General Counsel for the Justice Cabinet, is substituted in place of General Counsel for the Department of Corrections.

All other portions of the Court's Order entered this date in the above styled action are hereby REAFFIRMED.

This 30th day of June, 1997.
Bill Cunningham, Circuit Judge"

An appeal to the Kentucky Supreme Court resulted in counsel having full access to Harold McQueen from 9:00 p.m. until the execution. The Court's unanimous opinion and order reads:

"OPINION AND ORDER

**AFFIRMING IN PART, AND
REVERSING IN PART**

It is hereby ordered that the order of the Lyon Circuit Court is partially affirmed and partially reversed in that the appellant shall have personal access to the Honorable Randall Wheeler, as his attorney, for the purpose of exercising his attorney/client relationship including full communication with Mr. Wheeler beginning 9:00 p.m., CDT, until such time as counsel is removed to the witness room. During such period, Wheeler shall have telephonic communication with other counsel.

Counsel is subject to normal security procedures.

IT IS HEREBY ORDERED that Appellant's motion for a stay of his execution is DENIED.

All concur.

ENTERED: June 30, 1997
Robert F. Stephens, Chief Justice

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